Award No. 2206
Docket No. DC-2135

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

H. Nathan Swaim, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES

NEW YORK CENTRAL RAILROAD SYSTEM

STATEMENT OF CLAIM: Claim of the Joint Council Dining Car Employes Local No. 370 on the property of the New York Central Railroad System, for and in behalf of Chester Budd and other employes similarly situated that:

1. By charging claimants for meals and lodging and deducting amounts charged from their wages, effective as of March 1, 1941, the carrier violated the Agreement of April 1, 1938, particularly Rule E, Article I and Rule C., Article IV and

2. That Chester Budd, et al, who have been charged for meals and lodging and from whose wages deductions were made shall be reimbursed in the total amount thus deducted, retroactive to March 1, 1941, through and inclusive of August 31, 1941.

EMPLOYES' STATEMENT OF FACTS: An agreement between this Carrier and its Dining Car Cooks and Waiters was negotiated and became effective April 1, 1938. Rule (E) of Article one of this agreement provides in part:

> "(e) Deadheading. For deadheading in the interest of the company, the hourly rate shall be paid. **When employes deadhead under instructions, they will be given a letter identifying them to be provided with meals in dining cars and sleeping accommodations . . .**"

Rule (C) of Article four provided that:

> "(c) The Company shall provide quarters for employes on runs where layovers are necessary."

The above agreement was revised effective January 1, 1942, and similar provisions were included in Rule 8, Paragraph B and C.

Prior to March 1, 1941, no charge was made by carrier for meals or lodging in accordance with the above quoted rules whether the employes were in service or deadheading. Effective March 1st, 1941, the carrier, without conference or agreement with the representative began to charge for meals and lodging and deducted this charge from the wages of employes.

POSITION OF EMPLOYES: As of February 14, 1941, the Administrator Wage and Hour Division, U. S. Department of Labor, issued an "Order" establishing minimum wages in the Railroad Carrier Industry from which we quote in part:

> "Part 591. Minimum wage rate in the Railroad Carrier Industry."

Plaintiffs thereafter filed motion for additional Finding of Facts and Conclusions of Law, and also motion for new trial, which motions were subsequently submitted to the court without argument on September 9, 1940. On October 11, 1940 the court overruled the motion for new trial, and under the law plaintiffs had 90 days to file notice of appeal. Appeal was filed with the Circuit Court of Appeals for the 8th Circuit but was subsequently withdrawn and stipulation for dismissal entered, as the result of which the judgment against plaintiffs in the District Court stands unchallenged.

In the District Court's Finding of Facts, paragraph 3 reveals that on February 1, 1927, plaintiffs through their representatives entered into a Wage Agreement with defendant by the terms of which defendant was to continue practice of furnishing meals and lodging to its employes (Waiters). In Conclusions of Law, the Court held in paragraph 3 that, by the terms of the Fair Labor Standards Act, wages include reasonable cost to defendant of meals and lodging customarily furnished to the plaintiffs by defendant; in paragraph 4 that the Administrator had fixed such reasonable cost at not to exceed actual cost; in paragraph 8 that it was entirely proper for plaintiffs and defendant to enter into a contract fixing the terms of employment and wages but that said contract was material to the case only for the purpose of determining or throwing such light as it could upon the question of whether the meals and lodgings should be treated as part of plaintiffs' wages; in paragraph 9 that the meals and lodgings furnished were not gifts or were not free in the sense that a meal or lodging is furnished a beggar at the door, but were and had been for many years considered as a part of the benefits derived by the plaintiffs from the employment which they were engaged in; in paragraph 10 that the Fair Labor Standards Act does not require that wages be paid entirely in money or cash, but that it clearly implies that the reasonable cost to the employer of such things as meals and lodging may be included as part of the wages, and, where so included and the total valuable consideration customarily received by the employe equals the minimum wage, the Act has not been violated; and in paragraph 12 that the evidence in the case did not show plaintiff's wages, as that term is defined by Section 3 (m) of the Act, had been less than the minimum wage, and, therefore, the bill should be dismissed.

All these Findings and Conclusions deal with conditions that are present in the instant issue, except that the minimum wage was 30 cents at the time the M-K-T litigation was brought, whereas the minimum was 36 cents during the period involved in the present issue. Practice here has been to furnish meals and lodgings to dining car waiters, and such has been the custom for many years. The reasonableness of the cost items used in this Carrier's calculations has not been questioned by its employes and therefore is not an issue here. The Carrier's calculations, as reflected by Carrier's Exhibit 2, are in no material respect at variance with the decision of the District Court, Carrier's Exhibit 3, in "an action for recovery of minimum wages under the Fair Labor Standards Act."

The claim in this case falls for lack of support, either under the Fair Labor Standards Act or the contract between the parties.

OPINION OF BOARD: Pursuant to the provisions of the Fair Labor Standards Act of 1938, the Administrator made an order, effective March 1, 1941, establishing a minimum wage of 36¢ per hour.

The Fair Labor Standards Act defined "Wage" as follows:

> "'Wage' paid to any employe includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employe with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employes."

The applicable Agreement provided for a cash payment to the petitioners of less than 36¢ per hour but also expressly provided that when deadheading they were to be furnished meals in dining cars and sleeping accommodations and were also to be provided quarters on runs where layovers were necessary. While the agreement did not expressly provide therefor, it had long been the practice of the carrier to furnish meals without charge to such employes while they were on duty.

After the order of the Administrator fixing a minimum wage of 36¢ per hour became effective the carrier continued to pay the same cash wage to the employes that it had been paying under the Agreement, but set up on its books a charge for the meals and lodging furnished, to show that the employes were actually receiving a total amount in cash and meals and lodging of 36¢ per hour. If the charge for meals and lodging amounted to more than enough to bring the total up to 36¢ per hour the charge over that amount was ignored. If the charge was not sufficient to bring the total up to the required amount the difference was paid to the employe in cash.

It was admitted that the charge made by the carrier for meals and lodging was reasonable, although it had not been passed on by the Administrator.

The petitioners insist that the order of the Administrator fixing the minimum wage as of March 1, 1941, must be accepted as changing the basic rate payable in cash under the Agreement and that since the Agreement and practice of the parties provided for free meals and lodging the carrier must continue to furnish them free and not deduct a charge therefor from the 36¢ per hour established by the Administrator's order.

The carrier, on the other hand, contends that the Fair Labor Standards Act of 1938 and the order of the Administrator promulgated thereunder could not possibly affect the Agreement between the parties except in so far as the two were in conflict. The carrier points out that the minimum wage fixed by the Administrator need not all be paid in cash but under the definition of "wage" in the Act, it may consist of cash plus the reasonable cost of meals and lodging; that the charges against the petitioners for meals and lodging were set up on the books of the carrier simply to show that the petitioners were receiving the minimum "wage" fixed by the Administrator.

The petitioners contend that the meals and lodging could be considered as something furnished in lieu of cash wages only where the carrier furnished the employe with all of his meals and all of his lodgings. It certainly could be considered meals and lodging "customarily furnished" without including all of the meals and lodging of the employe.

The carrier contends that this claim merely constitutes an attempt to have this Board interpret and enforce the Fair Labor Standards Act and is, therefore, a matter over which this Board has no jurisdiction. This Board in prior awards has repeatedly said that it had no interest in nor jurisdiction over the enforcement of the Act but apparently has determined many claims in which the Act was involved on the theory that the Act amended the agreement and that the claim, therefore, presented a question of the interpretation and enforcement of the agreement as modified by the Act.

If the merits of this claim were before us as a new question we should feel compelled to deny the claim on the theory that the "wage" paid by the carrier to the employes under the Agreement complied with the Administrator's order and that the Agreement, therefore, was not modified by the order.

We have many awards by this Division of the Board in which this Division has held that the order of the Administrator fixing a minimum wage of 36¢ per hour amounted to an amendment of the agreement raising to 36¢ per hour the basic rate of all employes receiving less than that amount and that all other provisions of the agreement remained unaffected by the order.

In Awards numbered 1699, 1712 and 1728 this Division in opinions written by Edward M. Sharpe, Referee, held that the Federal Act modified the agreement for persons who had been receiving a wage of less than 36¢ per hour and made their basic rate 36¢ per hour; that any overtime, payable pursuant to the provisions of the agreement, should be paid for at time and one-half on this modified basic rate, or at 54¢ per hour, even though the overtime pay, calculated on the basic rate provided for in the agreement would amount to more than 36¢ per hour.

In Awards numbered 1714, 1768, 1769, 1770, 1803 and 1804, in opinions written by Referees Carl B. Stiger, Herbert B. Rudolph and Sidney St. F. Thaxter, this Division held that the carriers involved could not reduce the number of hours of an employe's assignment below eight hours per day and thus meet the minimum rate of 36¢ per hour even though the employe continued to be paid the monthly amount provided by the applicable agreements—again in effect holding that the other rules of the agreement were not affected; that the Federal Act only modified the basic rate provided by the agreement.

In Award 1726, in an opinion by Edward M. Sharpe, Referee, this Division held that the carrier, under an agreement which provided that the carrier would furnish houses to certain employes, could not take credit for the reasonable cost of such housing to compute a total "wage" which would equal the minimum rate set by the Administrator; that the Federal Act modified the agreement for persons receiving less than 36¢ per hour; and that the carrier could not meet the minimum rate by paying the cash wage provided by the agreement and charging for the use of the houses in violation of the agreement.

In Award 1727 this Division held that a carrier paying an employe 33¢ per hour plus board prior to March 1, 1941, must thereafter pay the employe 36¢ per hour and could not set up a charge of the difference of 3¢ per hour for board.

It would seem to the present referee that the claims covered by Awards 1726 and 1727 could have been distinguished from Award 1712. In the latter award the total basic "wage" of the employe, under the agreement, was cash in an amount less than 36¢ per hour. The carrier was forced by the Federal Act to pay a higher basic rate. However no such distinction was drawn.

In Award 2098, Ernest M. Tipton, Referee, held that the claim there involved, the facts of which cannot be distinguished from the instant claim, was governed by Awards 1726 and 1727; that the dining car employes there involved were entitled to 36¢ per hour; and that it was a violation of the agreement to set up a charge against them for meals and lodging furnished pursuant to the agreement.

In a memorandum to Award 1680, Referee Lloyd K. Garrison thoroughly considers and discusses the weight which should be given to prior awards. His views are approved and followed in Award 2126 written by Referee Sidney St. F. Thaxter. We agree with the views concerning awards as precedents expressed in these two awards and are, therefore, constrained to hold that in the instant case the carrier violated the agreement by charging the employes for the meals and lodging furnished.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 11th day of June, 1943.

Dissent to Award No. 2206, Docket No. DC-2135

In the Opinion of Board the statement is made:

> "If the merits of this claim were before us as a new question we should feel compelled to deny the claim on the theory that the 'wage' paid by the carrier to the employes under the Agreement complied with the Administrator's order and that the Agreement, therefore, was not modified by the order."

In view of the definite pronouncement that the Agreement between the parties was not modified, which is contrary to the awards cited, it is our opinion that the correct construction of the Agreement should prevail.

This Board is not bound to perpetuate error found in prior awards.

/s/ R. H. Allison
/s/ A. H. Jones
/s/ C. P. Dugan
/s/ R. F. Ray
/s/ C. C. Cook